

**BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2016-376-C**

Petition of Network Communications International Corporation for Initiation of a Rulemaking Regarding Inmate Rate Caps, Provider Assessed Ancillary Fees and Single Payment Products)	COMMENTS OF PAY TEL COMMUNICATIONS, INC.
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Pay Tel Communications, Inc. (“Pay Tel”) provides its comments in response to the Public Service Commission of South Carolina’s (“Commission”) Order 2016-788 dated November 9, 2016 directing interested parties to file comments on the Petition of Network Communications International Corporation (NCIC) for Initiation of a Rulemaking Regarding Inmate Telephone Rate Caps, Provider-Assessed Ancillary Fees and Single-Payment Products (“Petition”).

SUMMARY

NCIC’s Petition is premature, given the proceedings addressing inmate calling services (“ICS”) currently taking place at the Federal Communications Commission (“FCC”) and before the United States Circuit Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”). Those proceedings at the federal level could preempt any Commission determinations regarding intrastate inmate calling service (“ICS”) rates. Moreover, some of what the Petition seeks to implement (“Ancillary Fee Caps”) has already been implemented in South Carolina via FCC order. Finally, the Petition should not be considered by the Commission because 1) the proposed rate caps are not based on any actual costs (South Carolina-specific costs or otherwise) of an inmate service provider to provide ICS; 2) the proposed rate caps do not reflect the different costs to provide ICS based on type and size of confinement facilities; and 3) the proposed rate caps do not consider and include appropriate compensation for confinement facility costs.

INTRODUCTION

1. Pay Tel has provided inmate calling services (ICS) since 1989. Pay Tel was certified to provide ICS in South Carolina on March 4, 1991 by Order 91-22 in Docket No. 1990-305-C. Pay Tel has continuously served South Carolina confinement facilities since that date. Pay Tel provides ICS in 168 confinement facilities (prisons and jails) in 16 states, including 13 facilities in South Carolina. Pay Tel primarily provides ICS in small to medium-size confinement facilities, such as county jails. The South Carolina confinement facilities served by Pay Tel in South Carolina range from 30 to 430 inmates.

PROCEEDINGS AT THE FCC AND THE DC CIRCUIT COURT OF APPEALS

2. The Federal Communications Commission (FCC) has been actively considering ICS rates since a Petition for Rulemaking was filed at the FCC by inmate activists in 2003.¹

3. Subsequently, in its 2013 Interim Rate Cap Order, the FCC set “interim” rate caps for interstate ICS rates and further required that all ICS rates and fees “must be based only on costs that are reasonably and directly related to the provision of ICS.”²

4. Thereafter, in its 2015 Rate Cap Order, the FCC set “permanent” rate caps for intra- and interstate ICS and ancillary charges associated therewith.³ ICS rate caps were determined based on the cost of each ICS call as reported by inmate telephone providers (including Pay Tel) in response to the FCC’s Mandatory Data Collection. The 2015 Rate Cap

¹ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Petition of Martha Wright et al. for Rulemaking or, in the Alternative, Petition to Address Referral Issues in Pending Rulemaking*, CC Docket No. 96-128 at 3 (filed Nov. 3, 2003).

² *Report and Order and Further Notice of Proposed Rulemaking, Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375 (Rel. Sept. 26, 2013) (“2013 Interim Rate Cap Order”). The “cost-based rate” requirement was stayed on appeal by the D.C. Circuit so has never gone into effect. *See Securus Tech. v. Federal Communications Commission*, No. 13-1280 (and consolidated cases) (D.C. Circuit Jan. 13, 2014). This appeal was ultimately held in abeyance by the court due to the ongoing administrative proceedings concerning permanent ICS rate caps. That appeal remains dormant before the court.

³ *Second Report and Order and Third Further Notice of Proposed Rulemaking*, FCC 15-136, released November 5, 2015 (“2015 Rate Cap Order”).

Order recognizes that the costs to provide ICS vary with the type and size of the confinement facility, grouped by inmate Average Daily Population or “ADP”.

5. Accordingly, the 2015 Rate Cap Order sets rate caps for four (4) different confinement facility “tiers”: three different sizes of jails (as measured by ADP), and all prisons. The FCC established the lowest per-minute rate caps for prisons, and set successively higher rate caps for each jail tier (as the ADP decreases). However, the 2015 Rate Cap Order *did not* include any recovery of costs associated with payments to confinement facilities (traditionally referred to as “commissions”).

6. The rates established by the FCC in the 2015 Rate Cap Order have not gone into effect due to an ongoing appeal. Specifically, the D.C. Circuit has stayed for the pendency of the appeal the 2015 Rate Cap Order’s “permanent” rate caps for interstate and intrastate calling service and the cap on fees for single-call services.⁴ In a further order, the D.C. Circuit made clear that its stay order applied to any application to intrastate calling services.⁵

7. However, other parts of the 2015 Rate Cap Order (regulation of ancillary fees, prohibition of per-call charges, and the requirement that all calling rates be assessed on a per-minute-of-use “MOU” basis), were not stayed by the D.C. Circuit. As such, inmate providers such as Pay Tel were required to file intrastate tariffs to implement those parts of the 2015 Rate Cap Order that were not stayed. Those rates have been in effect in South Carolina since June 20, 2016, as required by the 2015 Rate Cap Order.

8. On August 9, 2016, in response to a Motion for Reconsideration of the 2015 Rate Cap Order, the FCC issued the 2016 Facility Rate Cap Order, which set new, higher rate caps for

⁴ Order, *Global Tel*Link v. Federal Communications Commission*, No. 15-1461 (D.C. Cir. March 7, 2016).

⁵ Order, *Global Tel*Link v. Federal Communications Commission*, No. 15-1461 (D.C. Cir. March 23, 2016).

ICS and replaced the rates issued in the 2015 Rate Cap Order.⁶ The 2016 Facility Rate Cap Order reconsidered certain findings in the 2015 Rate Cap Order, recognized that confinement facilities incur legitimate costs in making ICS available, and concluded that those costs should be recovered in ICS rates. Accordingly, the FCC increased the applicable rate cap for each facility tier by an amount it recognized as reasonably incurred confinement facility costs.⁷

9. On November 2, 2016, the D.C. Circuit stayed the 2016 Facility Rate Cap Order.⁸ As a result, the rate caps imposed by the 2016 Facility Rate Cap Order will not go into effect during the appeal of the 2016 Facility Rate Cap Order before the D.C. Circuit.

10. In summary, all per-minute rate caps set by the FCC in its various orders—other than the “interim” caps on interstate calling services—will not go into effect (if at all) until the D.C. Circuit rules on the various appeals from these FCC orders pending before it. However, the FCC’s regulation of ancillary fees, prohibition of per-call or per-connection charges, and the prohibition of flat-rate calling have been in effect for Pay Tel’s intrastate operations in South Carolina since June 20, 2016.

COMMENTS ON THE PETITION

11. As a threshold matter, those “Ancillary Fee Caps” listed in the Petition are already in effect as a result of the 2015 Rate Cap Order. In particular, the 2015 Rate Cap Order limits “ancillary service charges” to the amounts proposed in the Petition. *See, e.g.*, 2015 Rate Cap Order at ¶ 144. And as described above, because that portion of the 2015 Rate Cap Order has *not* been stayed by the D.C. Circuit, those rate caps for “ancillary service charges” are in effect, in South Carolina and elsewhere.

⁶ *Order on Reconsideration, In re: Rate for Interstate Inmate Calling Services*, WC Docket No. 12-375 (FCC Aug. 9, 2016).

⁷ *Id.* at 22-23, ¶ 45.

⁸ *Order, Securus Technologies, Inc. v. Federal Communications Commission*, No. 16-1321, (D.C. Cir. November 2, 2016).

12. Further, there is no basis to set any remaining rates for ICS in South Carolina based upon the Petition at this time. The FCC considered detailed cost data from inmate service providers as a basis for setting rate caps. The NCIC Petition, by contrast, does not appear to be based upon any cost of providing service. More specifically, the Petition could not have proposed rate caps based upon South Carolina-specific costs, because NCIC does not provide any ICS in South Carolina. Considering rate caps that are not based on specific costs provides no benefit to either providers or consumers. Should the FCC's orders be upheld on appeal, those cost-based rates will be implemented in South Carolina and elsewhere. If the FCC's orders are reversed by the D.C. Circuit, this Commission could consider whether to set rate caps based upon costs. However, the Petition presents no such costs, and therefore could not form the basis for intrastate ICS rates.

13. Similarly, the Commission should not consider any rate proposal that does not distinguish between the type and size of confinement facilities. The NCIC Petition does not distinguish between prisons and jails, nor does it allow for differences between jails with differing ADPs. The FCC, by contrast, considered both the type and size of confinement facilities in creating 4 tiers of rate caps.

14. Finally, any rate caps must include confinement facility costs. The Petition does not consider or include any such costs. The FCC's rate caps, by contrast, also took into account reasonably incurred confinement facility costs.

CONCLUSION

As set out above, there is no reason for the Commission to consider the Petition's ICS rate caps at this time, given the fact that the FCC proceeding to address these rates and charges is ongoing. Moreover, the Commission should not consider the Petition because its proposed rate caps a) are not based on actual ICS costs; b) do not take facility type and size into consideration; and c) do not include reasonable confinement facility costs.

Respectfully submitted,

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THE PUBLIC SERVICE COMMISSION OF
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DOCKET NO. 2016-302-C

Petition of Network Communications)
International Corporation for Initiation of)
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Caps, Provider Assessed Ancillary Fees)
and Single Payment Products)

CERTIFICATE OF SERVICE

This is to certify that I have caused to be served this day the Comments of Pay Tel Communications, Inc. via first class mail service and electronic mail service as follows:

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November 21, 2016
Columbia, South Carolina